NOS. 75-5014 and 75-5015

In the Supreme Court of the United States

OCTOBER TERM, 1975

JEFFERSON DOYLE, PETITIONER

v.

THE STATE OF OHIO, RESPONDENT

and

RICHARD WOOD, PETITIONER

v.

THE STATE OF OHIO, RESPONDENT

On Writ of Certiorari To The Court Of Appeals Of Ohio, Tuscarawas County

BRIEF FOR THE STATE OF OHIO

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I QUESTIONS PRESENTED

A. May a defendant take the witness stand at trial and commit perjury with impunity by testifying to an exculpatory story blatantly inconsistent with his silence at the time of his arrest and not be sub-

jected to impeaching cross-examination as to:

1. his silence
   a. at the time of his arrest,
   b. at his preliminary hearing,
   c. or at any point before trial;
2. his refusal to consent to a search of his car?

B. May a prosecutor properly argue to the jury that such a defendant has been successfully impeached as a witness because of his silence which was blatantly inconsistent with his exculpatory trial testimony?

C. May a co-defendant, tried and convicted separately for the same offense, take the stand as a witness for his accomplice and commit perjury with impunity by testifying to an exculpatory story blatantly inconsistent with his silence at the time of his arrest and not be subjected to

impeaching cross-examination as to his silence:

1. at the time of his arrest,
2. at his preliminary hearing,
3. or at any point before trial?

D. May a prosecutor properly argue to the jury that such a witness has been successfully impeached because of his silence which was blatantly inconsistent with his exculpatory trial testimony?

II STATEMENT OF THE CASE

A. The Facts of the Offense.

In order for this Court to appreciate the posture of the case which presents such questions, a rather full statement of the facts must be set forth.

The Multi-County Narcotics Bureau is a law enforcement agency enforcing the laws against illicit drug traffic in Tuscarawas County, Ohio (Wood R. 107, Doyle R. 250).

On April 28, 1973, this law enforcement agency received word from one of its in-

formants that he had set up a deal to purchase 10 pounds of marijuana from the defendants. The defendants wanted $175.00 a pound, or $1,750.00 for the 10 pounds (Doyle R. 157).

There was a frantic rush to gather the money in time. Only $1,320.00 could be gathered, but part of this currency was photocopied so that the serial numbers of the bills could be recorded (Wood R. 40, Doyle R. 158).

The informant and his vehicle were searched by Multi-County agents. Then he was given the money and went off to his rendezous with the defendants at the Cloverleaf Bar in Dover, Ohio. Since the Cloverleaf Bar was too crowded to talk business, they went across the street to another bar where the bargain was struck (Wood R. 41, 42, Doyle R. 161, 162).

The defendant Doyle then went to get the marijuana while the defendant Wood

stayed with the informant who drove to the nearby city of New Philadelphia, eventually winding up in a parking lot behind a bar called the 224 Club (Wood R. 42, Doyle R. 162). The defendants told the informant that Wood was staying with him so that he could not report the transaction to the authorities (Wood R. 43, Doyle R. 163).

The defendant Doyle rejoined them in the 224 Club parking lot after flashing his lights as a signal. There, the exchange took place. The defendants gave the informant the marijuana, and he gave them the money (Wood R. 44, Doyle R. 164).

Now during this entire time, the defendants and the informant were under surveillance by a group of law enforcement officers from the Multi-County Narcotics Bureau, the Dover Police Department, and the Tuscarawas County Sheriff's Department (Wood R. 116, Doyle R. 260). One of these officers, Captain--now Chief--Griffin, of

the Dover Police Department, saw the transfer in the parking lot of the 224 Club and testified at trial to that effect (Wood R. 266, Doyle R. 345).

When the defendants were picked up, they were advised of their *Miranda* rights (A. 4, 20) and asked to give consent to have their car searched. They refused (A. 4, 5, 6, 20, 21, 22). Then police officers secured a search warrant (A. 5). Sure enough, upon execution of the search warrant, there was the money which had been photocopied wadded up under the floor mat on the passenger side (Wood R. 134, 135, Doyle R. 275).

B. TRIAL

1. The Defendants' Story.

On completion of the state's case-in-chief, the defendants took the stand. After having discovered the state's case, and listened to the state's witnesses at

the preliminary hearing (A. 27, 31) and at trial, they concocted a story about a frame--a bizarre, exculpatory story blatantly inconsistent with their silence at the time of their arrest.

According to them, Doyle *had* indeed contacted the informant about a drug deal (Wood R. 377, Doyle R. 468), but he wanted to *buy* marijuana from the informant, not sell it (Wood R. 384, Doyle R. 470). Wood, who was along just for the ride so that he could visit his daughter in Steubenville (Wood R. 439, Doyle R. 434), didn't hear any of the details of the negotiations because he was ogling a go-go girl (Wood R. 384).

Wood's explanation for Doyle's using Wood's car was: "Jeff asked if he could use the car to go get his old lady--or excuse me, his wife..." (Wood R. 440). Little did he know Doyle's true reason was to gather enough money--together with a small

loan of nearly $1,000.00 from Wood--to buy ten pounds of marijuana from the informant (Wood R. 385, Doyle 224). Nevertheless, he compliantly rode to a second location in the informant's pickup truck while his scheming friend had his new, leased Cutlass (Doyle R. 435).

During his drive to get the money, Doyle was suddenly smitten by conscience. He said to himself, said he, "What am I going to do with ten pounds of marijuana?" (Wood R. 387, Doyle R. 471).

Returning to the previously-appointed meeting-place in the parking lot of the 224 Club, an apprehensive Doyle vacillated among conflicting feelings of buying only one pound, or the whole ten pounds because the informant would be "mad," or two pounds (Doyle R. 473, 474). Nonetheless, the informant went away "mad" with his sack full of 10 pounds of marijuana since he wanted an all-or-none deal. Wood, who had been

patiently waiting in the informant's pick-up truck while Doyle turned down the informant's deal, now leisurely returned to his own car as a passenger and was awe-stricken to discover a wad of money in the back seat (Wood R. 388).

Both immediately smelled some kind of frame or set-up even though Wood didn't know anything about what was going on. They almost simultaneously agreed to chase the informant around several blocks of New Philadelphia "to find out what was going on" (Wood R. 389, 443, Doyle R. 436, 476, A. 10, 22). Even so, Wood felt it was prudent to hide the money under the floor mat (A. 6). At one point during this chase, Doyle pulled over and stopped to explain to Wood what had been happening (Doyle R. 477), or to count the money (Wood R. 391), depending from which trial you take Doyle's testimony. In the Wood trial (which was earlier) Doyle said that Wood was not aware

of what was going on even after they were stopped by authorities (Wood R. 391).

Thus, the story of the defendants gained plausibility by meshing with details law enforcement officers could testify to, details that the defendants could freely admit without actually confessing to the critical elements of the crime. For example, defendants could hardly safely deny that they had hidden the marked money under the floor mat because, after all, police officers had found it there, hadn't they? Of course, the defendants had a ready explanation for hiding the money. It is an old defense technique.

2. Cross-examination of Defendants.

The prosecutor, faced with this fantastic, yet arguably plausible, story, *had* to attack vigorously both it and the credibility of those who had told it.

This he did in a long series of questions designed to show that the jury was being given a recent fabrication by the defendants.

One method of attack upon the defendants' credibility chosen by the prosecutor was to cross-examine them about their silence at the time of their arrest (A. 6-14, 22-31).

It didn't turn out to be quite silence. Doyle's response to his being placed under arrest for sale of marijuana, by his own testimony, was: "I didn't know what he was talking about," or "What's this all about?" (Doyle R. 479, A.12). Wood testified that he did indeed protest his innocence (A. 31).

At any rate, part of the defendants' explanation for their silence at the time of their arrest was that they wanted to get legal advice before they said anything (A. 25). "...I didn't have nobody there

to help me answer the questions...If I started, I don't know where I would have stopped" (A. 26).

If that was the only explanation, then, after having consulted an attorney, indeed after being represented by one at the preliminary hearing, they could have given their exculpatory stories to law enforcement authorities. This they did not do (A. 27).

The prosecutor did not pussyfoot. The issue here is raised strongly in unequivocal terms. (For example, "Wouldn't that have been a marvelous time to protest your innocence?" (A. 26). A safer approach would have been to couch the questions in terms such as, "Have you ever offered this explanation to anybody else?" But the prosecutor did not choose to be safe; he knew he was right.

III ARGUMENT

A. SUMMARY

It seems to me that a rule of law cannot be considered in a vacuum. It must be regarded as to how it will affect the actual facts of real cases. That is why so many of the facts have been set forth in this brief. Perhaps, too, that is why some argument has crept into my presentation of the facts and that some facts will find their way into the argument.

The Respondent's position, simply stated, is that a prosecutor has just as much right to ferret out perjurers by vigorous, impeaching cross-examination as defense attorneys or attorneys in civil matters and that nothing in the Constitution of the United States prevents the kind of cross-examination petitioners here complain of.

The argument below might be viewed as a kind of syllogism:

1. Nothing in the Constitution prevents a criminal defendant who chooses to testify in his own behalf from being impeached by his own inconsistent acts and statements.

2. Silence at the time of arrest and at preliminary hearing can be such an act.

3. Therefore, a criminal defendant may properly be asked questions about his silence at the time of his arrest and at the preliminary hearing, during cross-examination for the purpose of impeaching his testimony *when his silence was inconsistent with his trial testimony.*

B. THE CONSTITUTION

An appropriate starting place for this inquiry is the Constitution. The only conceivable part of it which has any relevance is that part of the Fifth Amendment which says, "No person...shall be compelled in any criminal case to be a witness against himself..."

What do those words mean?

It seems that every constitutional law case could be viewed as an exercise in constitutional interpretation and construction, a striving to give life to those original precious phrases.

Therefore, when I look at the quotation from the Constitution above, the word which stands out and cries for interpretation and application is *compelled.*

Indeed, early cases in this area were directed against obvious abuses of governmental compulsion against individuals (*E.g., Brown v. Mississippi*, 297 U.S. 278 (1936). A sampling of coercive factors this Court has considered since would include incommunicado detention, *Haynes v. Washington*, 373 U.S. 503 (1963); threats, *Lynumn v. Illinois*, 373 U.S. 528 (1963); physical deprivation of sleep or food, *Reck v. Pate*, 367 U.S. 433 (1961); limits on access to friends or attorneys, *Crooker v. Californ-*

ia, 357 U.S. 433 (1958); fear of mob violence, *Payne v. Arkansas*, 356 U.S. 560 (1958); and extended or repeated interrogation, *Chambers v. Florida*, 309 U.S. 227 (1940).

Later cases focus upon the psychological coercion of the custodial atmosphere *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964).

This brief historical examination and scrutiny of the text of the Constitution itself lead one to the inescapable conclusion that there must be some sort of *compulsion*, some sort of *compelling* present to run counter to the constitutional prohibition. When a person voluntarily blurts out a threshhold confession before a law enforcement officer can advise him of his rights, men of sense realize that no constitutional violation has occurred and that such evidence should not be excluded because there was no element of compulsion.

In *Miranda, supra*, Chief Justice Warren, at page 478, said:

> There is no requirement that police stop a person who enters a police station and states that he wishes to confess a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

Was there any compulsion in the instant case?

First, there was none at trial. The defendants took the stand presumably upon the advice of able counsel, but undoubtedly of their own free will and choice (Wood R. 370, 371 where a colloquy, out of the hearing of the jury, occurs in which the trial judge ascertained that the witness Doyle was making an informed choice to testify despite the fact that his trial was to be held yet). They knew full well, or should have, that they were subjecting themselves to a searching cross-examination.

Nor was there any compulsion of the defendants to remain silent at the time of their arrest. To view the gentle and benevolent advice of the *Miranda* warning as compulsion seems to be stretching a point dangerously thin. To be sure, law enforcement officers advised defendants of their *Miranda* rights, including the right to remain silent. But they did not *force* the defendants to remain silent. To harken back to the early cases cited above, an absurd picture comes to mind of law enforcement officers' twisting the defendants' arms and saying, "Don't you dare say anything!" No, the decision of the defendants to remain silent at the time of their arrest was again the product of their own free will and choice.

C. THE PROBATIVE VALUE OF SILENCE

1. The Meaning of Silence.

Does silence mean anything?

The great American poet, Edgar Lee Masters, in a poem named *Silence*, wrote, in part:

> I have known the silence of...
> ...a man and a maid, ...
> And the silence of the sick
> When their eyes roam about the room
> And I ask; For the depths
> Of what use is language?
> A beast of the field moans a few times
> When death takes its young:
> And we are voiceless in the presence of realities--
> We cannot speak.

The Respondent commends a reading of the entire poem, *Silence*, to the Court. It can be found in the book *Songs and Satires* published by the Macmillan Company in 1916, among other places. The poet's point, of course, is that a person often expresses himself or communicates far more effectively by remaining silent rather than by saying anything in mere words.

Anybody who doubts that silence has meaning should enter the locker room of an athletic team after it has lost an important competition. He should observe lovers looking into each other's eyes after a long separation.

2. The Interpretation of Silence

a. In the Prosecution's Case-in-Chief

While we may all agree that silence can have meaning, can express things, can communicate, the difficulty comes in when we try to say what the silence means. Concededly, silence is often ambiguous. That is why the rule against prosecution use of silence in its case-in-chief makes sense. There is great danger in using silence as evidence of guilt. In that area its probative value is so small, because of its ambiguity, that it should be excluded as a matter of law. Such a wise rule of evidence could only become a matter of consti-

tutional law through the procedural due process requirements of the Fifth and Fourteenth Amendments, but not through the self-incrimination part.

b. In Impeaching Cross-Examination

It is quite another matter where a criminal defendant intervenes with a volunteered exculpatory version at trial.

Here arises a line of cases, distinct from the line culminating in *Miranda*. This second line of cases deals with varying aspects of cross-examination of defendants who take the stand in their own behalf and it culminated in *United States v. Hale*, -- U.S. -- (June 23, 1975).

The beginning point is *Raffel v. United States*, 271 U.S. 494 (1926). In *Raffel*, a defendant took the stand in his second trial. The first trial had resulted in a hung jury. At that first trial he had not offered himself as a witness to refute a government

witness's testimony in regard to an admission of ownership. At the second trial, he did. Upon cross-examination, the government asked, "Did you go on the stand and contradict anything they said?" The answer was, "I did not." Then he was asked, "Why didn't you?" The response was, "I did not see enough evidence to convict me."

The Court held that it was not error to require the defendant Raffel, offering himself as a witness upon the second trial, to disclose that he had not testified as a witness in his own behalf upon the first trial.

Next came *Grunewald v. United States*, 353 U.S. 391 (1957). There, a defendant had been called to Grand Jury and refused to answer certain questions. When he took the stand and answered those same questions in an exculpatory way at trial, the government, on cross-examination, exacted disclosure of his earlier failure to answer the questions.

The Court held that under the circumstances of the case as presented, the earlier silence of the witness was *consistent* with his trial testimony, and therefore the trial court had erred in permitting impeaching cross-examination as to his earlier silence.

The *Grunewald* opinion specifically declined to overrule *Raffel*.

Then came *Harris v. New York*, 401 U.S. 222 (1971). *Harris* held that the prosecution could impeach a defendant who took the stand and testified as to exculpatory facts inconsistent with an earlier statement, even though the earlier statement was obtained in the absence of *Miranda* warnings, and therefore coerced.

At page 225 of *Harris*, the Court said,

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury.... Having voluntarily taken the stand, petitioner was under an obligation

> to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process.

And, at page 226, the Court went on to say:

> The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.

Finally, in *Hale*, *supra*, a defendant was cross-examined as to why he had not offered his trial explanation as to the money in his possession at the time of his arrest.

The Court held the questioning was improper because there was no probative value to his earlier silence to show it inconsistent with his trial testimony.

c. The Threshhold Question

The teaching of these cases is that the trial judge, as arbiter of the law, must decide whether the trial testimony of the defendant is inconsistent with his silence at the time of his arrest. If it is not

inconsistent, the evidence goes out as a matter of law, having failed the balancing test announced in *Grunewald*, and followed in *Hale*.

In *Hale*, Justice Marshall, writing for the Court, said:

> If the Government fails to establish a threshold inconsistency between silence at the police station, and later exculpatory testimony, at trial, proof of silence lacks any significant probative value and must therefore be excluded.

Inferentially, then, the converse must be true. If the prosecution *does* establish a threshhold inconsistency, then silence *has* significant probative value and may be admitted into evidence.

Support for this view can be found in the Court's reconciliation of *Hale* with *Raffel v. United States*, *supra*. "The Raffel Court found that the circumstances of the earlier confrontation naturally called for a reply."

This is exactly the rationale of the Court in *United States ex Rel. Burt v. New Jersey*, 475 F. 2d 234 (Third Cir. 1973). There, a person arrested for breaking and entering said nothing to police about a murder he had committed earlier in the day. When tried for the murder, the defendant took the stand and testified that the shooting had been accidental. On cross-examination, he was asked why he had said nothing to police about the accidental shooting or seek any aid for the victim when he was picked up for breaking and entering.

In *Burt, supra*, Judge Rosenn, in a concurring opinion, which Respondent commends to this Court as well-reasoned, effectively answered Petitioners' misplaced reliance on *Miranda, supra*, and *Griffin v. California*, 380 U.S. 609 (1965).

Cross-examination was also allowed in *United States v. Ramirez*, 441 F. 2d 950 (Fifth Cir. 1971) *cert. denied*, 404 U.S.

869, *reh. denied* 404 U.S. 987, because it would have been natural for the defendant to reply under the circumstances of a confrontation at arrest. There, the defendant asserted a defense of coercion at trial --unidentified strangers in Mexico were making him sell heroin. He had, in fact, wanted to be arrested so that he could stop pushing drugs. *But*, he neglected to communicate his relief to law enforcement officers at the time of his arrest.

Relying heavily on *Harris*, the Court said, at page 954:

> The analogy of *Harris* to the case at hand is inescapable. Once Ramirez elected to testify and assert the defense of coercion he became subject to the "traditional truth-testing devices of the adversary process", including the right of the prosecution to show his prior inconsistent act of remaining silent at the time of his arrest. Thus, the district court was not in error in allowing the government to cross-examine Ramirez about his silence.

d. Application to Our Facts

It would be difficult to imagine a factual context other than the one set out in our case above where it would be more natural for the defendants to speak up at the time of their arrest if their exculpatory story were true.

Disclosure would have been natural first because the defendants could have expected an early release from custody. Respondent realizes that this ground was rejected in *Hale, supra*. But perhaps that rejection was made without consideration of certain language in *Miranda*, itself. At page 482 of *Miranda*, Chief Justice Warren, writing for the Court, said:

> When police inquiry determines that there is no reason to believe that the person has committed any crime, it is said, he will be released without need for further formal procedures. The person who has committed no offense, however, will be better able to clear himself after warnings with counsel present than without. *It can be assumed that in such circumstances*

> *a lawyer would advise his client to talk freely to police in order to clear himself* [Emphasis added].

Thus, *Miranda* recognized, even assumed, that an innocent accused would come forward when it was in his enlightened self-interest to do so.

An additional incentive for the defendants to offer their exculpatory explanation at the time of their arrest was that by doing so they could aid authorities in bringing wrongdoers (that is, the people who had framed the defendants) to justice.

Again, *Miranda* finds such conduct natural. At page 478 of *Miranda*, the Court said, "It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement."

If the story of the defendants were true, then the informant had, by his conduct, committed the Ohio crimes of possession of an illegal hallucinogen (Section 3719.41 of

the Revised Code of Ohio); unlawful attempt to induce another to use hallucinogens (Section 3719.44 of the Revised Code of Ohio); and giving false information to officials (Section 2923.42 of the Revised Code of Ohio).

As the good citizens which their trial testimony proclaimed them to be, the defendants were under at least a moral obligation to report this subverter of the criminal justice system to the authorities. Only fear of complete corruption among the Dover Police Department, the New Philadelphia Police Department, the Tuscarawas County Sheriff's Department, the Tuscarawas County Prosecuting Attorney, and all other local, state, and federal officials and citizens could overcome the motive a good citizen would have in speaking up. The often-advanced risk of involvement would not apply in Petitioners' case. They were already deeply involved.

Either this, or the defendants' story at trial was a fabrication, a vicious, slanderous, perjurious fabrication.

Thus, Respondent submits that defendants' silence at the time of their arrest had great probative value as to the issue of whether their trial testimony constituted a recent fabrication.

Certainly the prosecution had a right to try to prove that the defendants' version was a lie. And the state could have done so by means of an inconsistent statement obtained in violation of *Miranda* (*Harris, supra*) or with evidence otherwise unavailable in its case-in-chief, or by direct evidence such as a confession of falsehood, *if such was available.*

e. Probative Value v. "Prejudicial Impact"

As was referred to above, *Grunewald* used a balancing test which was followed in *Hale*. Respondent feels the probative value side

of the scales has been loaded by arguments above concerning threshhold inconsistency, facts showing the bizarre nature of the trial testimony, and common sense expectation of disclosure of the exculpatory explanation, if there was one. Against this, must now be matched what the Court has referred to as "the prejudicial impact."

In doing so, it seems to me, that care must be taken to avoid the error of equating the term *prejudicial* with *damaging*. There is no doubt that evidence of the defendants' silence at the time of their arrest was *damaging* to them. But it never has been grounds for exclusion of evidence that it hurts. If so, conviction of any criminal defendant would be an impossibility.

As a matter of fact, Respondent feels that the use of the term *prejudicial* is imprecise. There is nothing in the Constitution or elsewhere, which says, "Prejudi-

cial evidence shall not be introduced." In a sense, direct eyewitness testimony or evidence of a proper confession is "prejudicial" to the case of a defendant. But it is "proper prejudicial" evidence.

To say that evidence of no probative value has *a* prejudicial effect on a jury appears to be a contradiction in terms. The weightier arguments become to show that silence has probative value, they defeat their own purpose because these same arguments tend to show "prejudicial impact." Conversely, if the prosecution convinces a court that the "prejudicial impact," of such evidence is slight, he has probably convinced that same court that such evidence has slight probative value. It seems unfair to cast the prosecution upon the horns of such a dilemma. A more accurate expression might be that certain evidence has a "prejudicial" effect *because it has probative value.*

f. The Conduct of Petitioners' Attorney

There is a further reason for suggesting that impeaching cross-examination about silence when it would be natural not to remain silent is proper. Petitioners' attorney himself thought it was! In the trial of the very case before this Court, Petitioners' attorney sought to show the testimony of a state's witness to be false or a recent fabrication by cross-examining him as to his silence about his testimony before trial.

The Defendant Doyle was asked on cross-examination about a conversation he had with a law-enforcement officer after his arrest. He gave his version of the conversation. On rebuttal the prosecution called the law enforcement officer who gave a different version of the same conversation (Wood R. 486-489). Suprised by this, Petitioners' attorney cross-examined by asking

the following questions:

1. "Did you record anywhere in writing this conversation that you have related to us today?" (Wood R. 497).

2. "And it is also fair to say you didn't tell the prosecutor before August 31, the day he filed his answer?" (Wood R. 497).

3. "Now Mr. Beamer, don't you think it a bit unusual that you did not record a resume of these conversations in writing shortly after their occurrence?" (Wood R. 498).

4. "Why didn't you tell the prosecutor that night?" (Wood R. 501, line 2).

5. "Why didn't you tell the prosecutor that night?" (Wood R. 501, line 4).

6. "Why didn't you tell him the man confessed?" (Wood R. 501).

7. "Since you agree it is an admission or a confession, why didn't you tell it to the prosecutor?" (Wood R. 501).

8. "Why didn't you tell him that morning or as soon as you could get to him?" (Wood R. 501).

Thus, the defendants' attorney resorted to the very cross-examination technique he complains about.

D. CONCLUSION

Prosecutors need to have the impeaching tool they thought *Harris v. New York, supra,* had given them as a weapon against perjury. What else can a prosecutor do when faced with exculpatory trial testimony of defendants which is blatantly inconsistent with their conduct at the time of arrest? How else can he impeach such trial testimony? If he cannot impeach the teller of the story, the only other thing he can do is to swallow it, allow the story to go unchallenged to the jury.

Part of the reason for *Mapp v. Ohio,* 367 U.S. 643 (1961), and *Miranda, supra,*

was to deter improper or unlawful police activity. Indeed, use of illegally-seized evidence or improperly-obtained confessions has been allowed for purposes of impeachment on cross-examination *Harris, supra; Walder v. United States,* 347 U.S. 62 (1954). It seems strange to form a more stringent rule where, as here, police conduct has been thoroughly proper.

In *Walder,* the Court said, at page 65:

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the Weeks doctrine would be a perversion of the Fourth Amendment.

Respondent suggests that allowing the exculpatory story of Petitioners Doyle and Wood, defendants below, to go to the jury unchallenged would be a similar perversion of the Fifth Amendment.

Therefore, Respondent submits that the questions presented at the beginning should be answered: A. No, B. Yes, C. Emphatically no, and D. Yes.

Question C.'s answer comes in for especial emphasis because whatever shields a defendant may claim at trial, his accomplice, who has been given, or is going to be given, a separate trial, has even less claim to these privileges.

In short, when the procedure complained of here is laid beside the Constitution, there is no conflict. When the exculpatory story of the defendants is laid beside their silence at the time of their arrest, under the circumstances of this case, there is great conflict.

Respondent respectfully submits that this Court should take one of the courses of action given below:

1. Dismiss the case, the writ of certiorari having been improvidently granted.

This would be an appropriate course, Respondent feels, because in order to sustain Petitioners' position this Court must hold that evidence of defendants' silence, at the time of arrest, regardless of its consistency or inconsistency, is of so little probative value that it should be excluded as a matter of law--constitutional law at that.

Respondent believes the Constitution requires no such thing.

2. Affirm the decision of the Ohio Court of Appeals for Tuscarawas County, Ohio.

Selection of the second course of action would, of course, require some formulation of a rule of law.

While it would undoubtedly be easier to state a rule of law which would apply to criminal defendants as guilty as Petitioners, the duty of this Court would appear

to be to frame a rule which can be fairly applied to innocent and guilty alike.

Respondent therefore suggests this rule: When defendants' voluntary testimony reveals that it would not make sense for them to remain silent at the time of their arrest, cross-examination about this behavior which is inconsistent with their trial testimony may properly be made.

Respondent realizes that this kind of rule would lead to consideration at the trial level of each situation on a case-by-case basis. But that is consonant with footnote 7 in *Hale, supra*, where it is pointed out that consistency or inconsistency as a matter of law is uniquely in the discretion of the trial court.

The trials of these defendants were characterized by fairness, an even-handed fairness which drove toward twin desirable goals for the American adversary system. These trials assisted the jury in its pri-

mary aim--the ascertainment of truth. There is no reason to suppose a fair trial results when triers of fact are only given part of the truth, or a lop-sided version of the truth. Finally, somebody in the trial below was not telling the truth. The jury resolved this perjury issue against the defendants. Perjury is an act particularly insidious to the American system of criminal justice. This is so because it relies so heavily on witnesses who are sworn to, and it is assumed, *do* tell the truth. Whatever steps the criminal justice system can take against this monstrous evil, it should take.

Respectfully submitted,

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IV APPENDIX

Section 2923.42 Ohio Revised Code. Giving False Information to Officials.

No person shall knowingly give or assist in giving a false or fictitious call or report to the state highway patrol or to any police department, fire department, sheriff, constable, or other law enforcement officer, or to any person dispatching or operating an ambulance or other emergency vehicle with intent to mislead, misdirect, or improperly summon said officer or person.

...

Whoever violates this section shall be fined not more than one thousand dollars or imprisoned for not more than one year or both.

Section 3719.41 Ohio Revised Code. Purchase, Possession, or control.

No person shall, with intent to produce hallucinations or illusions, purchase, use, possess, or have under his control an hallucinogen...

Section 3719.44 Ohio Revised Code. Prohibitions.

No person shall:

(C) Induce or attempt to induce another person to unlawfully use or administer any hallucinogen...